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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MATHEW ENTERPRISE, INC., Plaintiff, v. **FCA US LLC f/k/a CHRYSLER GROUP LLC**, Defendant.	Case No. 13-cv-04236 BLF PSG **Chrysler's Revised Motion to Strike New Work Proffered by Edward M. Stockton** Date: June 9 Time: 9:00 a.m. Courtroom: 3 Location: 280 South 1st Street, 5th Floor San Jose, CA 95113 Action Filed: September 12, 2013 Trial Date: September 12, 2016

NOTICE OF MOTION

PLEASE TAKE NOTICE that on June 9, 2016, at 9:00 a.m., or as soon thereafter as possible, in Courtroom 3 of the above-entitled Court, located at 280 South 1st Street San Jose, CA 95113, Defendant FCA US LLC f/k/a Chrysler Group LLC ("Chrysler") will and does hereby move the Court for entry of an order striking new work by Edward M. Stockton, as reflected in certain exhibits and paragraphs of his Rebuttal Report.

March 28, 2016

Respectfully submitted,

/s/ *Colin Kass*

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[1] Unless otherwise noted, all emphasis is added and internal citations and quotation marks omitted. This brief uses the following citing conventions: "S1" refers to Stockton's Initial Report; "S2" refers to Stockton's Rebuttal Report; "W." refers to Woroch's Report; "S. Tr." refers to Stockton's deposition. "Ex." references are to exhibits to the Declaration of Colin Kass.

RULES

I. INTRODUCTION

Chrysler previously sought the opportunity to respond to new work offered by Stevens Creek's expert, Edward M. Stockton. This Court denied that motion and instead invited Chrysler to move to strike "those specific opinions" it "believes surpass[es] the scope allowed for rebuttal." ECF 164 at 3. Chrysler's accepts that invitation with this motion.

Stockton's rebuttal report contains new regressions, new market definitions, and new opinions on issues not addressed in his initial report. Because they are new, they have not been subject to any scrutiny or critique by Chrysler's expert, Dr. Glenn Woroch. Woroch has had no opportunity to show why Stockton's new work is not reliable, does not show what Stockton claims it shows, or is not relevant to this case. Stockton's new work includes the following:

- <u>Rebuttal Tab 3 (New Analysis of Dealers Making One-Off Sales in New Market Definition/Trade-Area)</u>. Tab 3 is an analysis of dealers selling a car into a new market area that Stockton defined for the first time on rebuttal. This market area is different from his original report, different from any suggested by Chrysler's expert, Dr. Glenn Woroch, and different from any reflected in the underlying factual record. Because it was presented for the first time on rebuttal, Woroch has not had an opportunity to show why this new analysis does not comport with generally-accepted methods for defining markets, is wholly irrelevant, and does not support Stockton's opinion that there is meaningful *intra*-brand competition.

- <u>Rebuttal Tab 6 (New Regression Comparing California to "Containment Area")</u>. Tab 6 is a new regression that analyzes the correlation between Chrysler's California market share and Chrysler's market share within Stockton's "containment area." This regression has no analog in the initial report. It tests whether California as a whole is similar to the containment area, an issue not raised by either Stockton or Woroch in their initial reports. Stockton uses this regression to suggest that there is limited *inter*-brand competition. But Woroch has not had an opportunity to show this is not so.

- <u>Rebuttal Tab 7 (New Cherry-Picked Anecdote of a Florida Relocation)</u>. Tab 7 is a new analysis that looks at the effect of a dealer relocation in Miami 17 years ago. This is a cherry-picked example, which has no bearing on any issue in the case, and concerns facts not otherwise in the record. There was no discovery of the Miami market or the specific relocation being analyzed. Woroch has not had an opportunity to show why this new analysis does not support Stockton's *new* opinion, *see* S2 ¶ 19, that it is "intuitive" that "*intra*-brand competition is more intense than *inter*-brand competition," since it is methodologically unsound (cherry-picking can never be sound) and does not deal with either new entry, price competition, or *inter*-brand competition.

- Rebuttal Tab 10 (Four New But-For Objectives). Tab 10 is a new opinion setting forth four alternative "but for objectives." In his report, Woroch pointed out that Stockton failed to present any but for objectives that would have obviated the alleged incentive discrimination. In Tab 10, Woroch seeks to cure this deficiency by proffering four alternatives, though he does not show that any of them are "functionally available," that objectives above those four alternatives are functionally unavailable, or that those four would obviate the alleged incentive discrimination. Woroch has not had an opportunity to show why new proposed alternative objectives do not speak to the issue of functional availability and were not the product of any economically sound methodology.

- Rebuttal Tab 13 (New Opinion of Availability). Tab 13 is an initial analysis of the months Stevens Creek would have earned its incentives had it not given up in August 2012. In his report, Woroch presented an analysis showing that the actual objectives would have been achieved between 4 and 7 of the 11 months of the alleged discrimination period, if Stevens Creek had tried to achieve them, and if Stockton's lost sales analysis was believable. On rebuttal, Stockton addresses this issue for the first time, and, dispensing with the assumption that his prior damages analysis should be believed, suggests that Stevens Creek would have achieved its incentives in only 3 of the 11 months. Woroch has not had an opportunity to show why this new analysis is inconsistent with Stockton's own damages model and was the product of unreasonable assumptions.

- Rebuttal Tab 14 (New Financial Analysis of Stevens Creek's Rationality/Profitability). Tab 14 is a new analysis of Stevens Creek's total dealership and new vehicle department profitability. In his report, Woroch showed that Stevens Creek acted irrationally by raising prices (or more technically, reducing its willingness to negotiate with price sensitive customers). Stockton did not address this issue in his initial report. On rebuttal, however, Stockton presents a chart showing Stevens Creek's monthly profitability. Woroch has not had an opportunity to show why this new analysis is not a reliable method for determining whether Stevens Creek acted rationally, but even if it were, it shows the opposite of what Stockton claims.

- Rebuttal Tab 15 (New Financial Analysis of Surrounding Dealers' Irrationality/Profitability). Tab 15 is a new analysis of surrounding dealers' profitability. In his initial report, Woroch noted that neighboring dealers similarly impacted by Fremont's entry, unlike Stevens Creek, chose not to give up, and earned their incentives in many months. Stockton did not address this in his original report. On rebuttal, Stockton renders a new opinion that the other dealers did not act "optimally" and presents charts showing their monthly profitability. Woroch has not had an opportunity to show why this opinion is economically unreliable and unsupported and does not speak to the rationality of using commercially reasonable efforts to achieve the incentives.

- Rebuttal Tab 16 (New Advertising/Inventory Analysis to Bolster Unsupported Claim of "Residual Effects"). Tab 16 is a new analysis of Stevens Creek's

advertising expenditures and inventory levels. In his initial report, Stockton speculated that there may be "residual effects" of the alleged incentive discrimination. Woroch pointed out that there was no evidence of it. On rebuttal, Stockton seeks to cure this deficiency with new charts. Woroch has not had an opportunity to show why these new charts are not a reliable method for establishing "residual effects" and do not actually support Stockton's conclusions. The advertising charts, for example, are not correlated with missed incentive payments, and the inventory levels only show that more cars sit on the lot when sales decline: an irrelevancy.

- Rebuttal Tab 18 (New Analyses to Downplay Gravity Model Error). Tab 18 offers three types of new analyses that seek to shore up his gravity model. The first purports to show the correlation between actual sales and predicted sales under Stockton's gravity model. Woroch has not had an opportunity to show why this new analysis shows the unreliability of Stockton's model, not the reverse. The second analysis shows what Stockton refers to as "mass," using a new market definition based on a 25-mile area, instead of a 50-mile area. Woroch has not had an opportunity to address this new market definition or why the analysis does not support Stockton's conclusions. The third presents a "rolling six-month" average of dealer "masses." In his report, Woroch showed that Stockton's gravity model is unreliable because "mass" is highly variable – and so the assumption that it would not change in response to Fremont's entry – is unwarranted. In his rebuttal report, Stockton seeks to mask this variability by performing a new analysis based on rolling six-month averages. Woroch has not had an opportunity to show why this new analysis does not address the deficiency, is inconsistent with Stockton's damages analysis, and would show no lost sales for most of the relevant period.

- Rebuttal Tab 19 (New Monte Carlo Simulation). Tab 19 is an analysis comparing the Monte Carlo simulation of his gravity model to another simulation, using a random generator. In his report, Woroch demonstrated that Stockton's Monte Carlo simulation was constructed to falsely validate the model regardless of how poorly it actually performed. On rebuttal, Stockton tried to save his Monte Carlo simulation by pointing out that the same flaw exists if you use a random data generator rather than actual data. Woroch has not had an opportunity to show that this new analysis is neither a reliable test of the gravity model nor a method for saving the Monte Carlo simulation. Nor has Woroch had an opportunity to explain why this new simulation proves, rather than disproves, that the original Monte Carlo simulation is incapable of falsifying the gravity model.

- Rebuttal Tab 21 (New Analysis of All-Brand Nationwide Dealer Gross Margins to Support New Opinion Concerning Historical Competitiveness of Automotive Market). Tab 21 is an analysis of dealer *per vehicle* "gross profit" margin for all car brands nationwide. In his report, Woroch cited academic studies showing that rational dealers typically do not pass on dealer incentives to consumers in the form of lower prices. On rebuttal, Stockton offers the opinion that times have changed since that study was performed. To support this assertion, he presents a new chart showing per vehicle gross profit margin over time. There is no

evidence in the record concerning dealer gross profits; the chart does not control for differences in vehicle brands or types, and does not speak to incentives. As such, Woroch has not had an opportunity to show that this new work does not constitute a valid or reliable analysis that dealers' practices concerning the pass-through of dealer incentives has changed over time.

- Rebuttal Tab 23 (New Damages Calculation Based on New Benchmark). Tab 23 is a new alternative method of establishing lost sales or damages. In his report, Woroch pointed out that the post-discrimination period was a superior benchmark than the pre-entry period, since the former reduces the error associated with the gravity model's inability to fully measure the effects of Fremont's entry. On rebuttal, Stockton presents a new damages estimate using the post-discrimination period as a benchmark. Stockton admits, however, that he has not shown that the small number of lost sales is "statistically significant." S. Tr. 744-45. Likewise, Woroch has not had an opportunity to evaluate this new damages estimate or whether it actually shows any lost sales.

- Rebuttal Tab 24 (New Damages Methodology Based on Selected Months). Tab 24 is a new damages analysis based on months Stevens Creek would have earned its objectives had it not given up. In his report, Woroch noted that Stevens Creek would have met its incentives in 4, 5, 6, or 7 months out of the 11-month discrimination period had it not chosen to raise prices in August 2012. On rebuttal, Stockton presents a new damages analysis that accepts the first two conclusions, but not the latter two, and presents damages assuming Stevens Creek just gave up in months it would have failed to meet its objectives. Woroch, however, has not had an opportunity to address why this new analysis overstates lost sales and fails to account for additional sales Stevens Creek would have made in all months had it not irrationally given up trying to achieve the incentives.

- Rebuttal Tab 25 (New Market Share Shifts Analysis Based on New Market Definition Used to Support New Diversion Opinion). Tab 25 is a new analysis of changes in relative changes in market shares for Stevens Creek and surrounding dealers using a new market definition. In his initial report, Stockton did not render any opinion on diversion. In his rebuttal report, Stockton claims that all lost sales can be assumed to be "diverted" sales because, on average, Stevens Creek lost market share and other dealers gained share. Woroch, however, has not had an opportunity to show why this analysis does not show diversion, why it is not methodologically sound, why (as Stockton concedes) it shows only the effects of convenience, why Stockton's conclusion rests on spurious correlation, and why it actually shows the lack of diversion, given that many share shifts are in the opposite direction.

As this shows, Chrysler has had ***no opportunity*** to respond to Stockton's new work, which should therefore be stricken. Rule 26 requires that initial reports contain a "complete" statement of "all opinions" that the expert will present. Rebuttal reports must be limited to

specifically responding to an opposing expert's report. They are not an opportunity to shore up flawed opinions with new work, tests, or theories. Nor are they an opportunity to insert new work that should have been disclosed in the initial report. This is for good reason. Waiting to present new work and opinions on matters that should have been in the initial report shields the work from critique, and shifts the burden of proof. That is what Stockton's rebuttal report does. Stockton's new analyses are not based on any unforeseen new facts disclosed for the first time in Woroch's report. Stevens Creek's wait-and-see approach was neither justified nor harmless. With expert discovery firmly closed and Chrysler denied the opportunity to respond, the proper remedy is to strike the new work.

II. LEGAL STANDARDS

An initial report "***must*** contain a ***complete*** statement of ***all*** opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i); *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 2009 WL 5873112, at *3 (D. Conn. 2009). The distinction between an initial expert report and rebuttal report is important. "A party presents its arguments as to the issues for which it has the burden of proof in its initial expert report." *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 2005 WL 1300763, at *2 (N.D. Ill. 2005); *In re Asbestos Prods. Liab. Litig.*, 2012 WL 661673, at *1 (E.D. Pa. 2012). Rebuttal is, accordingly, "limited to new ***unforeseen*** facts brought out in the other side's case." *Columbia Grain, Inc. v. Hinrichs Trading, LLC*, 2015 WL 6675538, at *2 (D. Idaho 2015). It is "no place for presenting new arguments." *Baldwin Graphic*, 2005 WL 1300763, at *2; *Century Indem. Co. v. Marine Grp., LLC*, 2015 WL 5521986, at *3 (D. Or. 2015) (same). In fact, new analysis that could have been included in the initial draft is "***precisely*** what is forbidden." *Columbia Grain*, 2015 WL 6675538, at *3; *Baldwin Graphic*, 2005 WL 1300763, at *2 ("The purpose of the rules governing expert witnesses is to safeguard against … surprise").

Failing to follow the proper order of expert disclosure causes prejudice. To allow a plaintiff to address an element of its case for the first time on rebuttal "would all but negate the

distinction between an initial affirmative expert and a rebuttal expert [and] deny a party the opportunity to rebut the new opinions expressed in a faux rebuttal report." *R&O Constr. Co. v. Rox Pro Int'l Grp., Ltd.*, 2011 WL 2923703, at *5 (D. Nev. 2011); *Braun v. Lorillard Inc.*, 84 F.3d 230, 237 (7th Cir. 1996). This evasive maneuver presents "the opportunity both to conceal or minimize weaknesses." *Century Indem.*, 2015 WL 5521986, at *5.

Stockton's rejoinder – that his new work was "in response" to the omissions and deficiencies identified by Chrysler's expert – is meritless. That Woroch identified an omission does not make Stockton's new analysis proper rebuttal. *See Century Indem.*, 2015 WL 5521986, at *4 (merely organizing a rebuttal report in reference to opposing points does not make it "a proper rebuttal report"); *see also Bowman v. IBM Corp.*, 2013 WL 1857192, at *7 (S.D. Ind. 2013); *STS Software Sys., Ltd. v. Witness Sys.*, 2008 WL 660325 (N.D. Ga. 2008).

Courts may strike nonconforming expert submissions under either Rule 37 or Rule 16. Rule 37(c)(1) was adopted to give "teeth to a significantly broadened duty to comply with case management orders" and Rule 26 disclosure requirements. *Gagnon v. Teledyne Princeton, Inc.*, 437 F.3d 188, 191 (1st Cir. 2006). "If a party fails to provide information … as required by Rule 26(a) …, the party is not allowed to use that information …, at a hearing, or at a trial, unless that the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). The remedy is "self-executing." Fed. R. Civ. P. 37(c)(1), 1993 Advisory Committee Notes; *see also, e.g.*, *Bowman*, 2013 WL 1857192 (striking new methodologies and damages analyses); *Jorgenson Forge Corp. v. Consarc Corp.*, 2002 WL 34363668, at *1 (W.D. Wash. 2002) (striking testimony that went "well beyond the scope" of prior reports); *Ebbert v. Nassau Cnty.*, 2008 WL 4443238, at *13 (E.D.N.Y. 2008). Additionally, this Court can strike belatedly disclosed work and opinions under Rule 16(f)(1)(C) as a violation of the scheduling order, which delineates merits and rebuttal expert report deadlines. ECF 127; *Akeva LLC v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002) (finding plaintiff violated the scheduling order and striking opinions based on new test offered only to "bolster [plaintiffs'] case").

III. MOTIONS TO STRIKE

A. Rebuttal Tab 3 and Related Opinions

In Rebuttal Tab 3, Stockton defines a relevant market or "dealer area" using drive time. S2 ¶ 16, Tab 3. But in his initial report, Stockton defined the market, or what he called the "containment area," based on an assumption of "counsel" that a dealer's market should include any census tract that touches a 50-mile radius from Stevens Creek. S1 ¶ 26; S. Tr. at 22, 29. The new market definition follows Woroch's critique of Stockton's "containment area" method, showing it is inconsistent with sound economics, logic, and common methods for defining markets in antitrust cases. W. ¶¶ 21-32, 74-81.

Stockton does not deny that Tab 3 constitutes a new market definition, but claims he included the drive time data on which the new definition is based in the backup to his first report. S. Tr. 624-25. Accordingly, he could have defined dealership markets based on drive time, but chose not to. *See Spirit Aerosystems, Inc. v. SPS Techs., LLC*, 2013 WL 6196314, at *7 (D. Kan. 2013) (excluding "testing that could have been completed by the time the original report was due"). Rebuttal is not a do-over. *R&O Constr.*, 2011 WL 2923703, at *3; *Bowman*, 2013 WL 1857192, at * 7 (a "rebuttal report is not the time to ***change*** methodologies to account for noted deficiencies"). By waiting for rebuttal, Stockton precludes Woroch from showing why the new definition is no better than the old one.

B. Rebuttal Tab 6 and Related Opinions

Rebuttal Tab 6 presents a regression, which Stockton uses to support his new opinion that "[Chrysler] dealerships compete against each other for a largely stable volume of new vehicle sales." S2 ¶ 20, Tab 6. The regression is "not in the original report." S. Tr. 578. Stockton does not deny that Woroch has not had "an opportunity to check the math [or] criticize the construction" of the regression, but argues that Woroch "should not have offered such an

unequivocal opinion" about the degree of intrabrand versus interbrand competition. *Id.* at 578-79. This is precisely the kind of gamesmanship that the Rules are designed to prevent.

Stockton cannot claim that Woroch's opinion on the level of intra- versus inter-brand competition came as a surprise. The interplay of intra- and inter-brand competition and its ramification for this case permeated Chrysler's Motion to Dismiss. ECF 23 at 15, 18 (arguing Chrysler's program "promotes long-run interbrand and intrabrand competition" and that instead of purchasing from Stevens Creek, customers "may have gone to a Ford, GM, or Toyota dealership"); ECF 33 at 4, 13 (same); ECF 50 at 13-14, 16, 42-43 (same). As explained in Chrysler's *Daubert* motion, the new regression does not do what it purports to do. Thus, because it has the hallmarks of expert analysis with complex sounding terms and math, but is flawed and unrebutted, it is exactly the kind of analysis that can mislead a jury, particularly when disclosed only *after* Chrysler could respond.

C. Rebuttal Tab 7 and Related Opinions

Rebuttal Tab 7 analyzes a relocation of a Chrysler dealership in Florida 17 years ago. S2 ¶ 21, Tab 7; S. Tr. 611. Stockton relies on this analysis to support his opinion about the magnitude of *inter*-brand competition versus *intra*-brand competition. As noted above, Stockton did not analyze this issue in his initial report. He admits the Florida analysis did not appear in his initial report: "it's new. … It didn't go into the affirmative report at all." S. Tr. 611-12. Woroch did not even mention Florida in his report, and there has been no discovery about Florida in the case. *Id.* at 612.

In fact, Stockton did not create the Florida analysis for this case. It is a pet anecdote of his used frequently in his litigation work. S. Tr. 613 (this study was "previously done" and he has "used [it] several times"). If he thought it relevant, he should have disclosed this analysis in

his initial report and provided Woroch an opportunity to review the underlying data and evaluate Stockton's conclusions. It should be struck.

D. Rebuttal Tab 10 and Related Opinions

Stevens Creek initially responded to Chrysler's interrogatory that asked for Stevens Creek's but-for objectives with a note that "some or all of the information sought by this interrogatory will be subject to analysis by one or more expert witnesses that plaintiff expects to retain in this action." Exs. 1-2 (Irog. No. 8). That analysis appeared for the first time in Rebuttal Tab 10. In his initial report, Stockton did not propose any but-for world objectives. Based on this absence, Woroch rightfully limited his own analysis, noting that, because "[n]either Stevens Creek nor Stockton performs this exercise," it is "not possible, based on Stockton's work to determine whether (or in which months) Stevens Creek would have earned its incentives in the but-for world." W. ¶ 36. That should have been the end of it, but Stockton seeks to cure the deficiency with four new calculations of but-for objectives. S2 ¶ 27, Tab 10. This work is flawed, but Woroch has not had the chance to show why. Strikingly, none of Stockton's but-for objectives are closer to actual "expected sales" than Chrysler's objectives. In addition, there has been no showing that these objectives represent the limits of functional availability; that those objectives could be set without the benefit of hindsight; or that Stevens Creek would have achieved those objectives. This new, unsound, and unrebutted analysis should be stricken.

E. Rebuttal Tab 13 and Related Opinions

Rebuttal Tab 13 presents a new lost sales estimate that purports to show that Stevens Creek would still have missed its objectives in only 8 of the 11 months of the discrimination period, instead of all 11, if it had acted more reasonably. S2 ¶ 44, Tab 13. Stockton's initial report did not analyze the number of months Stevens Creek would have earned its incentives had it sought to maximize sales and profits versus giving up and gaming the system. S. Tr. 715. Tab

13, then, is essentially a new lost sales analysis based on different math (a different mass input into Stockton's gravity model), and different base-line time period.

Compare new Rebuttal Tab 13 with Initial Tab 25. Initial Tab 25 started with a dealer's percent share of registrations from April 2011 through July 2012, while Rebuttal Tab 13 used July 2011 through June 2012. Tab 13 uses a mass of 112 for Stevens Creek, while the initial analysis used a mass of 116. Stockton also reduced expected sales by 4.6%, without showing that this represents the effects of Fremont's entry. In his initial report, this 4.6% adjustment was used "conservatively," but on rebuttal it becomes an aggressive assumption that favors Stevens Creek. Thus, while there was no reason to challenge the 4.6% adjustment in his initial report, there would be now, as it is being used for a very different purpose that flips the results.

F. Rebuttal Tab 14 and Related Opinions

Stockton uses Rebuttal Tab 14 to show that Stevens Creek lost money dealership-wide in July 2012 when it tried to achieve its objectives, and thus acted rationally by raising prices one month later. S2 ¶¶ 48-49, Tab 14. Both the analysis and the rationality opinion are new. In his initial report, he presented no opinion that Stevens Creek "would have been acting irrationally had it … tried to achieve its incentives." S. Tr. 445.

It is Stevens Creek's burden to show it acted rationally in increasing prices during the price discrimination period, and if it intended to present a net earnings analysis, it should have done so in Stockton's initial report to afford Woroch an opportunity to assess whether the analysis in fact shows rational pricing. *See Smith Wholesale Co., Inc. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 866-67, 870 (6th Cir. 2007) (plaintiff's burden to show objectives were not "realistically available" and missing them was not caused "by elements within its control").

Here, permitting the unrebutted analysis is particularly prejudicial because it is deceptive – Stevens Creek's ***new car*** sales division was highly profitable during the month in question, and

this case is about new car sales. More importantly, the analysis is not a reliable method of showing the effects of Stevens Creek's change in strategy, since it does not speak to whether Stevens Creek made more profit or less by raising prices in August 2012, control for other factors, isolate the effects of the incentives, or include any analysis of statistical significance. Indeed, to the extent relevant, the analysis shows that Stevens Creek's profits declined when it raised prices, undermining Stockton's assertion that Stevens Creek acted rationally.

G. Rebuttal Tab 15 and Related Opinions

Rebuttal Tab 15 is an analysis of the profits of surrounding "focus dealers," which Stockton had proffered in his initial report as appropriate for comparison to Stevens Creek. S1 ¶ 11. He presented no opinion that these dealers "acted irrationally by continuing to try to hit [their] objectives." *See* S. Tr. 381, 445. Yet, when Woroch used these dealers for comparison purposes, Stockton criticized Woroch for assuming that those dealers were rational economic actors. S2 ¶ 50. To support a claim that these surrounding dealers were irrational (and that only Stevens Creek knows best), Stockton presents Tab 15 to show the profits of each surrounding dealer. This analysis is flawed because it does not employ economic methods to determine the rationality of various pricing strategies, and simply tries to draw inferences from spurious correlations between dealer profitability and presumed pricing strategies. Because Woroch has not had an opportunity to address Stockton's new claims about the economic rationality of surrounding dealers, the analysis and his related opinions should be stricken.

H. Rebuttal Tab 16 and Related Opinions

Pages 1 and 2 of Rebuttal Tab 16 purport to show Stevens Creek's advertising expenses for 2012 and 2013, and pages 3-6 purport to show inventory (or the relation between purchases and sales) during the price discrimination period. S2 ¶ 52, Tab 16. Stockton cites these charts to support his opinion on "residual effects of lost sales." S2 ¶¶ 51-52. Stockton provided no

analysis of advertising expenses or inventory in his initial report. Nor did he support his initial claim that using the post-discrimination period as a benchmark would be improper due to the *possibility* of residual effects. See S1 ¶ 51; *see also* S. Tr. 66-67. Woroch pointed out this deficiency. W. ¶ 92. On rebuttal, Stockton sought to fill the gap with irrelevant charts. Woroch has had no opportunity to explain why these charts do not speak to the existence of "residual effects" and, in fact, show the opposite.

I. Rebuttal Tab 18 and Related Opinions

Page 1 of Rebuttal Tab 18 plots actual sales versus predicted sales using a Monte Carlo simulation. This is a new analysis because Stockton did not generate "predicted sales" using a Monte Carlo simulation in his initial report. Page 2 of Rebuttal Tab 18 is a new analysis of the change in masses using a new market definition, based on a 25-mile containment area rather than a 50-mile containment area. And pages 3 through 6 of Rebuttal Tab 18 present rolling six-month averages of dealer "masses." Stockton did not present any such analysis in his initial report; nor did he suggest that using a rolling six-month average would be a meaningful measure of anything. Woroch has had no opportunity to check Stockton's work or to explain why these new analyses are irrelevant and contradictory.

J. Rebuttal Tab 19 and Related Opinions

Rebuttal Tab 19, like Tab 18, is another attempt to re-do Stockton's Monte Carlo simulation. Stockton originally ran his Monte Carlo simulation on actual sales data, and Woroch showed that Stockton's simulation was flawed. W. ¶ 81, Exhibit 15. Instead of rebutting Woroch, Stockton ran an entirely new Monte Carlo simulation on a different set of data. This is improper. *Welch v. Eli Lilly & Co.*, 2009 WL 700199, *5 (S.D. Ind. 2009) (a "rebuttal report is one that contradicts or rebuts the arguments … of the opposing party's experts, not one that contains entirely new analysis"). Any simulation that Stockton intended to present to validate

his gravity model should have been disclosed in his initial report. Woroch found serious weaknesses in Stockton's first simulation, and would likely have found the same for the second, but was unfairly denied that chance.

K. Rebuttal Tab 21 and Related Opinions

Rebuttal Tab 21 presents a new analysis of the per vehicle gross margin for all dealers of all brands nationwide between 1998 and 2014. This analysis ostensibly supports a new opinion that the nationwide automotive market for all brands is more competitive now than it was in 2000, and led to the conclusion that dealer practices concerning pass-through of dealer incentives materially changed since then. The new analysis is flawed for a host of reasons, as it does not speak to dealer incentives, control for changes in mix of brand or model type, or control for the vast increase in vehicle volume (which increases dealer profitability even if the per vehicle gross margin declines). In any event, Woroch has had no opportunity to consider the relevance of nationwide gross profit margins to the issue of incentive pass through or the propriety of the data Stockton used to compile his figures.

L. Rebuttal Tab 23 and Related Opinions

Rebuttal Tab 23, like Tab 13, presents another new lost sales estimate. Instead of using Stevens Creek's pre-discrimination mass to calculate lost sales as he did in his initial report, Stockton ran the new calculation using Stevens Creek's post-discrimination mass. S2 ¶ 72; ECF 161 ¶ 8. This provides an alternative damages estimate in case his initial estimate is either thrown out (on *Daubert*) or rejected by the fact finder. Stockton, however, could have presented an alternative in his initial report and rejected doing so.[2] When Woroch identified both the

[2] In fact, recognizing that the post-discrimination period might be a better benchmark but not wanting to use it because it likely showed no (or virtually no) statistically significant lost sales,

omission and the flaws in Stockton's choice of benchmark, Stockton thought better of resting solely on the pre-entry period, and presented a new damages estimate based on the post-discrimination period. But Stockton conceded he did not test to determine whether the differences in mass between the discrimination period and the post-discrimination period were "statistically significant." S. Tr. 740-42. Nor has Woroch had an opportunity to address this issue or to address other flaws in Stockton's new damages analysis.

M. Rebuttal Tab 24 and Related Opinions

Rebuttal Tab 24 presents yet another new damages calculation, this time excluding certain (but not all) months in which Woroch demonstrated Stevens Creek's objectives were obtainable if Stevens Creek had simply acted as it did during the pre-discrimination period. S2 ¶ 73, Tab 24. Stockton presents this new analysis because his first one did not take into account the fact that Stevens Creek would have met its objectives in as much as ***64%*** of the time had it not given up in August 2012. *See* W. Exs. 7-1 (36%), 7-2 (45%), 7-3 (64%), 7-4 (55%). Presumably concerned that this may crater his initial damages analysis, Stockton estimates damages in the event Stevens Creek may only recover damages for the months it would have missed its objectives had it tried. In doing so, however, Stockton based his new analysis on Woroch's exhibits 7-1 and 7-2, purposefully ignoring half of the analysis. In any event, his new damages analysis is rife with assumptions about how Stevens Creek would behave. For example, if Stevens Creek had tried to achieve its objectives, not only would it have made its objectives about half the time, it would have made many more sales in the months where it missed the incentives. By waiting for rebuttal, Woroch has not had an opportunity to unpack this

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Stockton presented a "hybrid" approach in his initial report. S1 ¶ 67. What he did not do until rebuttal is present an estimate based only on the post-discrimination period.

strange new but-for world in which Stevens Creek tries to achieve its objectives some months and gives up other months, without regard to whether the objectives could be achieved using commercially reasonable efforts or the rationality of such decisions.

N. Rebuttal Tab 25 and Related Opinions

Rebuttal Tab 25 purports to show the change in Stevens Creek's post-entry market share (in a newly defined relevant market). Stockton submits this to support his new opinion that sales were diverted to other Chrysler dealerships. The chart in Rebuttal Tab 25 "was not in the original report." S. Tr. 551; *see also id.* at 31. Indeed, the initial report "doesn't give a comparison between Stevens Creek and specific dealers in the dealer areas … defined in [rebuttal] Tab 25." *Id.* at 552. The new work does not isolate any effects of the alleged incentive discrimination, but rather measures the effects of changes in convenience caused by Fremont's entry. *Id.* at 574 ("Q. … So actually what this might be capturing is differences in change and convenience. A. That's one of the things it would be capturing.").

Additionally, this new analysis rests entirely on a spurious correlation between aggregate market share movements. Even assuming this chart speaks to diversion (which it doesn't), it shows the opposite of diversion for many models. S. Tr. 559-61. While Stockton may claim that unspecified other factors explain this – and that his analysis should only be relied upon when they support his opinions and not when they don't – Woroch would be able to show that this is just plain bad science. In any event, Woroch has had no opportunity to address this or Stockton's new diversion opinions. They should be excluded.

IV. CONCLUSION

For the foregoing reasons, each of Stockton's new analyses and opinions should be stricken.

March 28, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Colin R. Kass, hereby certify that on March 28, 2016, I caused to be electronically filed Chrysler's Revised Motion to Strike New Work Proffered by Edward M. Stockton with the Clerk of Court using the CM/ECF system that will send notification of such filing to all attorneys of record.

March 28, 2016

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